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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-672

WILLIAM J. SMITH, *Petitioner,*

vs.

STATE OF CALIFORNIA, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 23, 1973.

I

OPINIONS BELOW

The Order of the District Court dismissing this action, which is unreported, is reproduced in the Appendix to this petition. The opinion of the Court of

Appeals is reported at ..... F.2d ..... (9th Cir. 1973), and is reproduced in the Appendix to this Petition.

II

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on July 23, 1973, and is reproduced in the Appendix to this petition. This Court has jurisdiction to review the judgment herein by Writ of Certiorari under 28 U.S.C. §1254(1). Federal jurisdiction is claimed under 28 U.S.C. §1331 and 42 U.S.C. §1983.

III

QUESTIONS PRESENTED FOR REVIEW

1. Does a citizen of the United States have available recourse against a State, for having been imprisoned by that State for six years and nine months "without cause;" particularly when the State's own Court found the imprisonment to have been "arbitrary, capricious and without just cause?"

2. Does an individual, whose Federal Constitutional Rights have been violated by a State, have a claim for relief against that State under 42 U.S.C. §1983?

3. If a State can prevent recourse under 42 U.S.C. §1983, will this Court vindicate violation of Federal Constitutional Rights under the United States Consti-

tution and 28 U.S.C. §1331; *Bivens v. Six Unknown Narcotic Agents,* 403 U.S. 388 (1971).

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fourteenth Amendment, Sections 1 and 5:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis supplied).

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

United States Code

Title 28, Section 1331(a):

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Title 28, Section 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Title 28, Supreme Court Rules, Rule 19(1)(b):

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Title 42, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be sub-

jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privleges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

California Government Code

Section 815.2:

"Injuries by employee within scope of employment; immunity of employee. (a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of acton against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

Section 820.2:

"Discretionary acts. Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

Section 820.4:

"Execution or enforcement of laws; exception. A public employee is not liable for his act or

omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

Section 845:8(a):

"Parole or release of prisoner; escape of prisoners. Neither a public entity nor a public employee is liable for:

(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

California Penal Code

Section 2940:

"Where the Adult Authority is authorized to fix and refix the term of imprisonment of a prisoner, such prisoner shall be discharged from custody upon the completion of said term so fixed or refixed and if the Adult Authority fails to fix the term of imprisonment the prisoner shall be discharged upon the completion of the maximum punishment provided by law for the offense for which the prisoner was convicted."

Section 3063:

"No parole shall be suspended or revoked without cause, which cause must be stated in the order suspending or revoking the parole."

V

STATEMENT OF CASE

Petitioner, William J. Smith, was sentenced on February 20, 1959 and on March 27, 1959 to serve in the State penitentiary no less than six months nor more than fifteen years as a result of convictions in two separate criminal proceedings. The sentences were to run concurrently.

On April 25, 1961, the California Adult Authority set petitioner's term of sentence on the above two convictions as seven and one-half years with four and one-half years to be served on parole.

The California Adult Authority thereby determined, pursuant to California Penal Code §2940, that petitioner, William J. Smith, was to be released from confinement in the State penitentiary and placed on parole on February 20, 1962.[1]

On February 26, 1962, the State of California failed to release petitioner, William J. Smith, from confinement, in violation of California Penal Code §§2940, 3063.[2]

Petitioner's release on November 19, 1968, was due solely to the granting by the Superior Court of the State of California, in and for the County of Kern, of a Petition for a Writ of Habeas Corpus filed by

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[1] "Where the Adult Authority is authorized to fix and refix the term of imprisonment of a prisoner, such prisoner shall be discharged from custody upon the completion of said term so fixed. . . ." (California Penal Code §2940).

[2] "No parole shall be suspended or revoked without cause, which must be stated in the order suspending or revoking the parole." (California Penal Code §3063).

petitioner in October of 1968. In granting petitioner's petition and ordering his discharge from confinement, the Superior Court found:

> "The action of the Adult Authority of February 26, 1962 was arbitrary, capricious and without just cause."

Contrary to petitioner's rights under the Fourteenth Amendment of the United States Constitution, petitioner was forced to remain in a State prison for six years and nine months and suffer the hardship, indignities, and loss of freedoms, privileges, and property incumbent with said illegal imprisonment.

The complaint in the instant action was filed on October 14, 1969 in the United States District Court for the Northern District of California. Jurisdiction was claimed under 28 U.S.C. §1331 and 42 U.S.C. §1983. Service of the complaint was made upon the State of California, the Department of Correction, and the Adult Authority on March 17, 1970.

On April 27, 1970, a Motion to Dismiss was filed by the State of California, on behalf of the State of California, Department of Corrections, and the Adult Authority.

On April 12, 1971, the District Court entered an order dismissing the complaint as to all defendants.

On May 27, 1971, petitioner filed his notice of appeal to the United States Court of Appeals for the Ninth Circuit.

VI

REASONS FOR GRANTING WRIT OF CERTIORARI

The United States Court of Appeals for the Ninth Circuit upheld dismissal of the instant action, under Fed.R.Civ.P. 12(b), on the grounds that the State of California is not a "person" and thus not liable under the Federal Civil Rights Act, 42 U.S.C. §1983; that the State of California can assert the principle of sovereign immunity from suit; and that a claim under 28 U.S.C. §1331 is "irrelevant" in the face of sovereign immunity.

The merits of the instant case have never been heard. However, the fact remains that petitioner was illegally imprisoned for six years and nine months by the State of California in violation of California Penal Code §§2940 and 3063, and has no compensation or recourse for this abominable misdeed.

Certiorari should be granted to provide this Court with the opportunity to declare such mistreatments shall not be ignored and that if the individual states refuse to give justice to individuals who have suffered grievous loss of federally protected rights then the federal judicial system will recognize a remedial procedure.[3]

Such a declaration by this Court will prod the individual states to re-examine their concepts of jus-

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[3] "'Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' Bell v. Hood, 327 U.S. at 684 (footnote omitted); see Bemis Bros. Bag Co. v. United States, 289 U.S. 28, 36 (1933) (Cardozo, J.); The Western Maid, 257 U.S. 419, 433 (1922) (Holmes, J.)." (*Bivens v. Six Unknown Narcotic Agents, supra,* 403 U.S. 388, 392.)

tice and equity, and encourage the states to provide their own concepts of remedial relief and to not place further burdens on the federal judicial system.

Such a declaration would meet precisely the guidelines expressed by Chief Justice Burger, dissenting in *Bivens v. Six Unknown Named Agents of The Federal Bureau of Narcotics,* 403 U.S. 388 (1971) to establish a much needed state remedy "against the government itself" under the doctrine of *respondeat superior* to meet "the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials."

In upholding a dismissal for lack of jurisdiction and for failure to state a claim for relief, the Ninth Circuit has, in essence, held that the courts don't have to reach the question of the violation of petitioner's Constitutional rights because there is no remedy. This is tantamount to saying that even though Constitutional rights have been violated, no remedy exists—nor will the courts seek one—to vindicate them.

The Ninth Circuit's rationale for this conclusion raises issues of law that are reviewable under United States Supreme Court Rule 19, 28 U.S.C.:

1) Whether the state is liable under 42 U.S.C. §1983 is an important decision that should be made by the Supreme Court.

2) Holding the State of California immune conflicts with applicable State law.

3) Holding 28 U.S.C. §1331 irrelevant to the instant action conflicts with decisions of this Court.

A. WHETHER THE STATE OF CALIFORNIA IS LIABLE UNDER 42 U.S.C. §1983 IS A DECISION THAT SHOULD BE MADE BY THIS COURT.

In its opinion, the Court of Appeals for the Ninth Circuit stated:

> "The State of California and the several other named political entities, not being 'persons' within the purview of 42 U.S.C. §1983, are not liable for monetary damages under that statute."

This Court has never decided the question of whether a state is or is not liable under 42 U.S.C. §1983. It is petitioner's contention that this unanswered question is too vital to the protection of individuals' Constitutional rights to be left to the variances of lower Court opinions.[4]

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[4]In the instant case, Petitioner could not identify the individual persons responsible for the violation of his civil rights, especially since most members of the Adult Authority at the time his release was set had died by the time he was finally freed. However, the Ninth Circuit decision, and others like it, work other hardships on plaintiffs in similar cases:

> "Some lower courts have expanded *Monroe* to immunize a broad range of public entities from suit under this section. By holding these entities immune, the federal courts have forced a difficult choice upon the litigant seeking redress for violation of his civil rights. To join the public entity as a defendant in a suit against a government employee under Section 1983, the plaintiff must often forego the benefits of a federal forum. If he should choose that federal forum, however, he may be compelled to sue a judgment-proof individual defendant. Furthermore, if he chooses the federal forum he must often sacrifice the opportunity to exert economic pressure upon local policy-making officials. Therefore, so long as . . . immunity is maintained, the elaborate statutory scheme to protect individuals from governmental abuses is vitiated because the federal courts cannot fulfill their duty to protect civil rights." Don B. Kates and J. Anthony Kouba "Liability of Public Entities under Section 1983 of the Civil Rights Act," 45 S.Cal.L.Rev. 131 (1972) (hereinafter cited as Kates & Kouba) (footnotes omitted).

The Ninth Circuit holding was ultimately based on an overextension of this Court's opinion in *Monroe v. Pape,* 365 U.S. 167 (1961), where the Court held that a *municipality* was not liable under 42 U.S.C. §1983 for violations of an individual's Constitutional rights.[5] The Court reviewed the legislative history of 42 U.S.C. §1983 and concluded that since the statute was drafted under the Fourteenth Amendment to the United States Constitution, which is directed at the states, it was not intended to reach municipalities that were under the power of the state rather than the federal government. This interpretation can be upheld by the debate in Congress regarding the passage of the federal Civil Rights Act:

> "As I understand the theory of our Constitution the national Government deals either with States or with individual persons. . . . With these local subdivisions we have nothing to do. We can impose no duty upon them; we can impose no liability upon them in any manner whatever. . . ." (Congressional Globe 42 Congress, 1st session 793; see also Representative Blair's statements at 795 and Representative Bingham's statements at 798).

However, the Supreme Court, as well as Congress, did recognize that the federal Civil Rights Act does apply to the states, since it was passed pursuant to

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[5] *Williford v. People of California,* 352 F.2d 474 (9th Cir. 1965) is based directly on *Monroe v. Pape, supra. Allison v. California Adult Authority,* 419 F.2d 822 (9th Cir. 1969) rests ultimately on *Sires v. Cole,* 320 F.2d 877 (9th Cir. 1963), which in turn is based on *Monroe, supra,* extending the *Monroe* holding to the states in one sentence, without precedent.

legislative powers granted by the states under the Fourteenth Amendment to the United States Constitution:

> "The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a Federal right in Federal Courts because by reason of prejudice, passion, neglect, intolerance, or otherwise, State laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the *state agencies.*" *Monroe v. Pape, supra,* 365 U.S. at 180. (Emphasis added).

The Court recognized that the Civil Rights Act was intended to afford a remedy against those who, representing the State in some capacity, were unable or unwilling to enforce State law.

The language of 42 U.S.C. §1983 provides for liability of "persons" acting under color of State law. In the same year that Congress passed 42 U.S.C. §1983, Congress passed other legislation defining the word "person" to include "bodies politic and corporate". Act of Feb. 25, 1871, Ch. 71, §2, 16 Stat. 431. Since this definition has been interpreted as allowable rather than mandatory, this Court felt free to exclude municipalities from the purview of 42 U.S.C. §1983. *See* Kates & Kouba, *supra,* 45 S.Cal.L. Rev. at 133 n. 12, However, this Court has never made such an exclusionary decision regarding the states.

Cases in some lower courts following *Monroe v. Pape, supra,* have overextended the *Monroe* decision

to uphold the proposition that states as well as municipalities are not liable under 42 U.S.C. §1983.[6]

However, this conclusion does not follow. Under our federal system of government, municipalities derive their power from the states and are specifically subject to state law. States on the other hand, are directly subject to the United States Constitution and especially to the Fourteenth Amendment of that Constitution.[7]

The fact that 42 U.S.C. §1983 was meant to apply to the states was reaffirmed in the case of *District of Columbia v. Carter,* 93 S.Ct. 602 (1973). Tracing the

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[6]"The degree of protection given to civil rights is not the same for every American but varies with the judicial circuit in which he is injured. This inequality stems from the morass of inconsistent federal decisions which have tried to follow *Monroe v. Pape's* ambiguous declaration that municipalities are not proper defendants under 42 U.S.C. Section 1983. Inconsistency might be tolerable if some courts had not interpreted *Monroe* to shield all public entities from any legal or equitable claims, a result unwarranted by *Monroe's* reasoning which threatens to emasculate the Civil Rights Act by removing the victim's best source of compensation and deterrence. To enhance and unify the scope of protection afforded civil rights *Monroe* should be reconsidered, or, as the United States Commission on Civil Rights has suggested, the federal rule of municipal liability should be codified. In the interim, the lower federal courts should not read *Monroe* to prohibit any more than damage claims against municipalities in states which have not abolished municipal liability. Adequate protection of constitutional rights requires no less." Kates & Kouba, *supra,* 45 S.Cal.L.Rev. at 167.

[7]"[I]nformal, behind the scenes exertion of state authority is as much within the scope of §1983 as the more usual examples of formal and open action leading to the denial of federal rights. The Fourteenth Amendment gave Congress the power to legislate against 'State action of every kind' having the effect of impairing federally guaranteed rights, Civil Rights Cases, 109 U.S. 3, 11, 3 S.Ct. 18, 27 L.Ed. 835 (1883), and Congress had exercised that power in §1983." *Kletschka v. Driver,* 411 F.2d 436, 447 (2d Cir. 1969).

legislative history of the statute, this Court recognized that the primary purpose of the Act was to enforce the Fourteenth Amendment. (93 S.Ct. at 605). The Act was designed primarily in response to the unwillingness or inability of state governments to enforce their own laws against those violating the civil rights of others and against individuals who, representing the state, would not enforce the state laws. (93 S.Ct. at 607).

This Court reasoned that the Fourteenth Amendment under which the Civil Rights Act was legislated is addressed only to states and those acting under the authority of states, not to private individuals or the federal government. Since the District of Columbia was not a state within the meaning of the Fourteenth Amendment, 42 U.S.C. §1983 should not apply to the District of Columbia. Furthermore, since the District of Columbia was already under federal jurisdiction, the federal courts already had means of reaching violations of Constitutional Rights by the District of Columbia and its agents.

The reasoning of this Supreme Court in *District of Columbia v. Carter, supra,* again refused to clearly and finally meet the question of whether the District of Columbia would have been liable under 42 U.S.C. §183 if it were a state. Or, similarly, whether states who violate the Constitutional rights of individuals, or condone such violations by their agents, are directly affected by the Civil Rights Act.

This Court has recognized the glaring need for remedial judicial procedures for injuries arising from

state acts. *(Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra).*

The Congress of the United States has recognized this need, as well, by enacting 28 U.S.C. §1983.

What has been lacking is this Court's willingness to recognize, by failing to rule, that *Monroe v. Pape* is confined to the facts raised in that decision and is not applicable to a state.

Such a conclusion would then leave the question of state immunity up to the individual states and create a vehicle whereby a private citizen, at least in California,[8] would have a remedy for loss of federally protected Constitutional rights.

Such a conclusion would also prompt individual states to set up their own state mechanism for providing such remedies and remove from the federal judicial system this burden of litigation.

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[8]"It is surely arguable, however, that a civil rights action can be maintained against a public entity in California, in view of the statutory declaration here that public entities are liable for injuries that are actionable against their employees. Govt. C. §815.2(a). But public entities when so sued may be permitted to assert any immunities recognized by state law (see, *e.g.*, Govt. C. §844.6), for *Monroe* seems to exclude public entities from the purview of the Civil Rights Act for the reason that (and thus, perhaps, only to the extent that) traditional concepts of sovereign immunity as recognized by state law were intended to be left undisturbed by Congress. To the extent that state law, as in California, admits liability of public entities for the torts of their employees, the reasons for limiting the application of §1983 to public employees no longer are persuasive." Van Alstyne, *California Government Tort Liability* §7.8, 291-292 (C.E.B., 1964).

B. THE HOLDING THAT THE STATE OF CALIFORNIA IS IMMUNE FROM SUIT IS IN CONFLICT WITH APPLICABLE STATE LAW.

Supreme Court Rule 19(b), 28 U.S.C., provides for a Writ of Certiorari where a decision of a Court of Appeals is in conflict with applicable State law.

In its opinion, the Ninth Circuit said:

> "The issue is whether California can validly assert the traditional principle of state immunity from suit. We are clear that it can. Here no fact or circumstances appear . . . to manifest a waiver of such immunity and a consent to be sued."[9]

However, in so holding, the Court overlooked the fact of the California Tort Claims Act, California Govt. Code §§810-996.6,[10] in which California has

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[9]The Ninth Circuit found no waiver of the type in *Parden v. Terminal Railroad of Alabama*, 377 U.S. 184 (1964). In *Parden*, this Court reasoned that the State consented to being sued under FELA by adopting and ratifying the commerce clause of the United States Constitution and by performing activities that violated the FELA statute.

It could be said that the State of California has consented to suit in the instant case either under 42 U.S.C. §1983 or under 28 U.S.C. §1331 by adopting and ratifying the "necessary and proper" clause of Article I, Section 8 of the United States Constitution and by adopting and ratifying the Fourteenth Amendment, Sections 1 and 5 to the United States Constitution.

However, it is not necessary for the Court to go this far in order to hold the State of California liable to suit. This is true because the State of California has already declared its availability to be sued under its own California Tort Claims Act, as discussed in this section.

[10]The California Tort Claims Act was passed in response to the decision in *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 359 P.2d 457, 11 Cal.Rptr. 89 (1961), eliminating government liability from tort suits. In *Muskopf*, 11 Cal.Rptr. at 90-91, the Court said:

> "The shifting fortune of the rule of governmental immunity as applied to hospitals is illustrative of the history of the rule

waived its immunity to suit in cases such as the one at bar where a mandatory duty, imposed by statute, has been violated, causing the harm at which the statute was directed.[11]

The California Supreme Court has interpreted the Tort Claims Act to provide for State amenity to suit whenever possible.

> "In *Muskopf,* we abrogated the common law rule of governmental immunity, observing that 'when there is negligence, the rule is liability, immunity is the exception.' (*Id.* at p. 219.) Our decisions since the adoption of the Tort Claims Act of 1963 (§§810-996.6) have adhered to this basic axiom of tort law. Thus, we have pointed

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itself. From the beginning there has been misstatement, confusion, and retraction. At the earliest common law the doctrine of 'sovereign immunity' did not produce the harsh results it does today. It was a rule that allowed substantial relief. It began as the personal prerogative of the king, gained impetus from sixteenth century metaphysical concepts, may have been based on the misreading of an ancient maxim, and only rarely had the effect of completely denying compensation. How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.' Borchard, Governmental Responsibility in Tort, 34 Yale L.J., 1, 4." (footnote omitted).

[11]Statutes imposing such mandatory duties include Calif. Pen. Code §§2940 (". . . such prisoner *shall* be discharged from custody upon completion of said term so fixed . . ." [emphasis supplied]) and 3063 ("cause *must* be stated. . . . " [emphasis supplied]). The California Courts have upheld government liability under the California Tort Claims Act for violation of such mandatory Penal Code sections. See *Shakespeare v. City of Pasadena,* 230 Cal.App.2d 387, 40 Cal.Rptr. 871 (1964).

Furthermore, in the instant case, none of the statutory immunities provided in the California Tort Claims Act apply. §820.2 refers to discretionary rather than mandatory acts; §820.4 specifically retains liability for false imprisonment; and §845.8(a) refers to decisions whether or not to grant parole, not to the duty to release once parole has been granted.

> out that 'courts should not casually decree governmental immunity . . .' (*Johnson v. State of California* (1968) 69 Cal.2d 782, 798 [73 Cal.Rptr. 240, 447 P.2d 352]), and that '[u]nless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail.' (*Ramos v. County of Madera* (1971) 4 Cal.3d 685, 692 [94 Cal.Rptr. 421, 484 P.2d 93].) (Italics added.)" *Baldwin v. State of California,* 6 Cal.3d 424, 435-6, 491 P.2d 1121, 99 Cal.Rptr. 145 (1972) (footnote omitted).

To allow the State of California's assertion of immunity, resulting in dismissal of the action before even a cursory examination of how petitioner's claim fits under the Tort Claims Act, is blatantly contradictory to California law.

Furthermore, it is clear that the waiver provisions in the Tort Claims Act were meant to provide for the state's accessibility to suit in Federal Court. The Senate Committee's comment to Section 815 (West's Cal.Govt.Code.Ann., p. 119, (1966)) declares:

> "This section abolishes all common law or judicially declared forms of liability for public entities, *except for such liability as may be required by the* State or *Federal Constitution.* . . ." (Emphasis supplied).

Since California retains liability required by the Federal Constitution, it logically follows that California consents to suit in Federal Court.[12]

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[12]*See* note 7, *supra.*

Although Petitioner contends that the states themselves are liable under 42 U.S.C. §1983, it is not necessary to reach such a broad conclusion in the instant case. For the reasons covered above, the State of California, in passing the California Tort Claims Act, has already placed itself under the jurisdiction of the Civil Rights Act.

C. THE HOLDING THAT 28 U.S.C. §1331 IS "IRRELEVANT" TO PETITIONER'S ACTION CONFLICTS WITH DECISIONS OF THIS COURT.

In dismissing the instant action without hearing the merits, and in affirming this dismissal, the lower courts have, in essence, made the substantive decision that no remedy exists to vindicate the admitted violation of petitioner's Constitutional rights by the State of California.

However, this procedure and inherent reasoning fly in the face of this Court's opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). (See Supreme Court Rule 19(b), 28 U.S.C.).

In *Bivens,* this Court recognized the problems inherent in the anomaly of acknowledging a right without establishing a means of vindicating that right when violated. This problem was pinpointed by the facts of the case in which the Constitutional rights of Webster Bivens were violated by federal agents, who were not liable under 42 U.S.C. §1983 because they were not acting under color of state law.

Unwilling to allow such violations of Constitutional rights to go unremedied, this Court recognized a fed-

eral claim for relief for money damages arising directly under the Constitutional protections of the Fourth Amendment to the United States Constitution.

This recognition in *Bivens* of such a Constitutionally based claim for relief was well-grounded in long-standing Supreme Court judicial policy to afford every possible protection of the law to an injured party. *See Marbury v. Madison,* 1 Cranch 137, 163 (1803).

In *Bell v. Hood,* 327 U.S. 678, 684 (1946) this Court encouraged the federal courts to "use any available remedy to make good the wrong done" when a general right to sue in Federal Court obtains:[13]

> "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood, supra,* 327 U.S. at 684. (Quoted in *Bivens, supra,* 403 U.S. at 392.)

In these cases, the Supreme Court has recognized that an individual's Constitutionally guaranteed rights are so basic, and that the guarantee of these rights is so important to the functioning of our society and governmental system, that the courts will be bold and creative in vindicating these rights whenever they are violated.

In *Bivens, supra,* the fact that the federal Civil Rights Act, 42 U.S.C. §1983, could not apply to United

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[13] In *Bell, supra,* the general right to sue was found in 28 U.S.C. §41(f). In *Bivens, supra,* the general right to sue was found in 28 U.S.C. §1331, the statute in question in the instant case.

States Bureau of Narcotics agents did not mean that an individual whose Constitutional rights had been clearly violated by those agents was without a remedy. Recognizing the importance of vindicating Constitutional rights against those who would rely on technicalities to frustrate that end, this Court recognized a remedy in money damages based directly on the United States Constitution.

As in *Bivens, supra,* the District Court had jurisdiction in the instant case pursuant to 28 U.S.C. §1331.

In *Bivens,* this Court turned to the Fourth Amendment as a basis for a federal claim for relief when the state-oriented Civil Rights Act did not apply.

A similar "safety-valve" remedy for the violation of Constitutional rights in the instant case is found in the Fourteenth Amendment provision that no state "shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra, is directly analogous to the instant case. If this Court concludes, as in *Bivens,* that Petitioner's Constitutional rights cannot be vindicated under 42 U.S.C. §1983, that conclusion does not mean that those rights cannot be vindicated at all.

A State Court of California has found the State without justification imprisoned a man for six years

and nine months. The Ninth Circuit has concluded that this wrong has no remedy under the Civil Rights Act directed to "persons" acting under color of state law. Petitioner contends this holding is wrong. (See *supra,* Sections A and B). However, if it is correct, this Court should direct the District Court, to follow the longstanding policy of using any available remedy to make good the wrong done, and to recognize a federal remedy for money damages arising directly under the Fourteenth Amendment to the United States Constitution.

Such a conclusion will place *Bivens, supra,* in a remedial posture in those instances where the individual states do not themselves provide relief for Constitutional injuries. Such a conclusion leaves with the states the ability to create their own chosen remedial procedures to correct such obvious injustices. However, most importantly, grievous injuries arising from Constitutional violations will *in fact* constitute a RIGHT, not simply in name only, and this Court will reaffirm its dedication to recognizing and preserving individual freedoms while also recognizing the independence of the states.

Dated, San Francisco, California,
October 16, 1973.

R. J. ENGEL,
Attorney for Petitioner.

(Appendices Follow)

Appendix I

ORDER OF THE DISTRICT COURT

United States District Court
Northern District of California

No. C-69 90 LHB

William J. Smith,
Plaintiff,
vs.
The State of California, et al.,
Defendants.

ORDER DISMISSING ACTION

A motion to dismiss the above-entitled action having been duly noticed, the matter was heard on May 22, 1970. John P. Oakes, Deputy Attorney General, appeared on behalf of the moving parties. After reviewing plaintiff's complaint and the points and authorities in support of the motion to dismiss, it appears that the court lacks jurisdiction over the subject matter of the complaint and that the complaint fails to state grounds upon which relief can be granted.

Now, therefore, It Is Ordered that the action against the defendants be dismissed.

Dated:

United States District Judge

Appendix B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Court of Appeals
for the Ninth Circuit

William J. Smith, Appellant, vs. State of California, Abelicio Chavez, et al., Appellees.	No. 71-2281 MEMORANDUM

[July 23, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLIN, KOELSCH and ELY, Circuit Judges

PER CURIAM.

The judgment of the District Court dismissing plaintiff's purported action, is affirmed.

The State of California and the several other named political entities, not being "persons" within the purview of 42 U.S.C. §1983, are not liable for monetary damages under that statute. *Williford v. People of California,* 352 F.2d 474 (9th Cir. 1965); *Allison v.*

California Adult Authority, 419 F.2d 822 (9th Cir. 1969).

It is irrelevant that plaintiff's action, in the words of 28 U.S.C. §1331, arises "under the Constitution, laws or treaties of the United States." The issue is whether California can validly assert the traditional principle of state immunity from suit. We are clear that it can. Here no fact or circumstances appear, as in cases such as *Parden v. Terminal Railway of the Alabama State Docks Dept.,* 377 U.S. 184 (1964), to manifest a waiver of such immunity and a consent to be sued. *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), relied upon by plaintiff, is wholly concerned with questions of federal claims against individuals—not sovereign immunity.

Lastly, since members of the California Adult Authority are immune from liability for damages for official acts, even though performed in a manner that is "arbitrary, capricious and without just cause" (e.g. *Worley v. California Department of Corrections,* 432 F.2d 769 (9th Cir. 1970)) the court was fully warranted in dismissing plaintiff's action with respect to the individual designated "Doe" (Chavez). It is immaterial that an erroneous reason was given for such dismissal.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-672

WILLIAM J. SMITH, *Petitioner,*

VS.

STATE OF CALIFORNIA, et al., *Respondents.*

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On May 3, 1971, the United States District Court for the Northern District of California issued an order dismissing petitioner's complaint brought under various provisions of the Civil Rights Act (No. C-69-90 AJZ). The dismissal is reflected in a minute order of that date.[1]

[1]The "Order Dismissing Action" which appears as Appendix I to the petition has been erroneously proffered as the order of the District Court. Our examination of the District Court records discloses that no such order was ever signed or filed. The purported order is actually the proposed order which was submitted to the District Court in conjunction with the Motion to Dismiss pursuant to Rule 114(d) of the Local Rules of Practice for the United States District Court for the Northern District of California. Only a minute entry for May 3, 1971, noting that the motion to dismiss was granted, reflects the final action of the District Court.

The opinion of the Court of Appeals for the Ninth Circuit, which was filed on July 23, 1973, has not yet been published. A copy of that opinion appears as Appendix II to the petition herein.

JURISDICTION

The jurisdiction of this Court is sought under title 28, United States Code, section 1254(1).

QUESTIONS PRESENTED

1. Can a State be sued for monetary damages under provisions of the Civil Rights Act of 1871?

2. Has the State of California consented to be sued in federal courts under provisions of the Civil Rights Act of 1871?

3. Can a State be sued for monetary damages under title 28, United States Code, section 1331(a) for an alleged violation of federal constitutional rights?

STATUTES INVOLVED

The following federal and state statutes are involved: title 28, United States Code, section 1331(a); title 42, United States Code, section 1983; and California Government Code sections 815.2(b), 820.2, and 845.8(a).

STATEMENT OF THE CASE

On October 14, 1969, petitioner filed a complaint in the United States District Court for the Northern District of California under various federal statutes including title 28, United States Code, section 1331, and title 42, United States Code, section 1983 (Civil Rights Act of 1871). Defendants included the State, various State agencies, and a number of "Does."[2] Those defendants which had been served filed a motion to dismiss on April 27, 1970.[3] On March 17, 1971, petitioner filed a motion for entry of default against the State and Abelico Chavez. On May 3, 1971, a hearing was held upon petitioner's motion for entry of default and defendants' motion to dismiss; the former being denied and the latter granted. An appeal was taken and on July 23, 1973, the Court of Appeals for the Ninth Circuit affirmed the decision of the District Court.

STATEMENT OF FACTS

Introduction

According to the complaint filed in the District Court, petitioner was serving several sentences in a State prison when, on April 25, 1961, the California Adult Authority fixed his sentence at 7 and ½ years,

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[2]Defendants listed included the State of California, the California Adult Authority, the California Department of Corrections, the County of Doe, and Does I-XX.

[3]The two State agencies were served on March 16, 1970, and the State itself was served the following day. According to petitioner, one Abelico Chavez was served as "Doe Three" on June 17, 1970. The records of the District Court do not contain any return of service on Mr. Chavez.

with 4 and ½ years to be served on parole. Under this determination, petitioner was scheduled to be released on parole on February 20, 1962. But on February 26, 1962, the Adult Authority rescinded its prior action and petitioner continued to remain confined in state prison until November 19, 1968. In October of 1968, petitioner filed a writ of habeas corpus in the Kern County Superior Court for the purpose of challenging his continued confinement, and on February 14, 1969, that court discharged petitioner from further confinement, finding that the Adult Authority's rescission of parole had been "arbitrary, capricious, and without just cause."

In the petition for writ of certiorari, petitioner has been even less candid with this Court in framing his "statement of case." Thus he has charged that State officials "failed to release petitioner . . . from confinement, in violation of California Penal Code §§ 2940, 3063," (p. 7) Petitioner has not explained, to the District Court or to this Court, the entire framework in which this case arises. Mindful of this Court's admonition in *Conway v. Adult Authority,* 396 U.S. 107, 110 (1969), and realizing therefrom that this Court does not desire significant constitutional questions to be decided in a vacuum, respondents offer the following factual background.

Underlying Facts

On February 18, 1959, petitioner was sentenced to State prison after having been found guilty of conspiring to commit burglary and second-degree bur-

glary, with a prior conviction of first-degree burglary.[4] On March 17, 1959, petitioner was also found guilty of second-degree burglary in a separate proceeding; the sentence imposed to be served concurrently with the February conviction.[5] The maximum term of imprisonment under these convictions was 1-15 years. Calif. Pen. Code § 461.

On April 25, 1961, the California Adult Authority fixed each of petitioner's terms of imprisonment at 7 and ½ years, with the last 4 and ½ to be spent on parole. On December 6, 1961, the Associate Superintendent of the institution at which petitioner was confined informed the Adult Authority that petitioner feared for his life if he were paroled within California[6] and recommended consideration of an out-of-state parole, though noting that petitioner had no contacts outside the State.[7] On December 15, 1961,

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[4]San Joaquin County Super. Ct. No. 13919.

[5]Los Angeles County Super. Ct. No. 201634.

[6]According to a letter which petitioner wrote to the Director of the Christian Service Center in Youngstown, Ohio, on January 29, 1963, the basis for this fear was that:

> "I was one of two informers for narcotics agents in California. As a result of my testimony, several key underworld figures were sentenced to long prison terms. The other informer was killed and I am certain I also will be killed as soon as I leave prison if I remain in California."

[7]In this letter, dated December 6, 1961, Associate Superintendent Lloyd observed:

> "I again talked to Smith . . . regarding his apprehension of living in California. As his parole date gets nearer, his fear of going out in California seems to become more evident. He feels very strongly that he will be killed within a short time if he remains in this State outside of prison. He desires to get into another State, preferably some distance from California. . . . He is California born and has no connections outside of the State of California."

upon receipt of the report concerning petitioner's fears, the Adult Authority placed petitioner's case on its March 1962 calendar for review. On February 1, 1962, a Classification and Parole Representative informed the Adult Authority that "It is the feeling of Institution Staff, who are aware of Smith's situation, that his chances to complete a successful parole in California are not good, due to external forces beyond his control."[8] On the basis of this negative recommendation and the absence of any out-of-state parole program, the Adult Authority rescinded its prior grant of parole on February 26, 1962.

Petitioner was granted a parole effective March 4, 1968, when suitable out-of-state arrangements had been made. However, petitioner was not physically released on parole until November 19, 1968, when such arrangements were completed.

Prior Habeas Corpus Litigation

Petitioner extensively litigated the propriety of the Adult Authority's action in rescinding his parole. He

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[8]Petitioner, too, had doubts about his ability to "make it" if he were paroled in California. In a letter dated May 29, 1963, to Mr. John W. Brewer of the Adult Authority, petitioner said:

> "Mr. Brewer there are more people than just Henry [illegible], that have concerned themselfs with my demise, he was not the only one I testified in court against there were others that I was the cause of there arrest and conviction, and still others, that were unaware of my actions and the part I played until they was brought before the federal grand jury then they realized that I was the causer. They now look upon me with acrimony and violence. They are on the streets now! This is my life! my only life! please don't let them spill my blood. Don't force me into a parole in the State of California. For how could I complete a parole in a state of trepidation? God knows that I do not want to come back to your prison."

filed a petition for a writ of habeas corpus in the Kern County Superior Court on April 2, 1965, but it was denied on April 15 (No. 726). He filed a similar petition in the California Court of Appeal for the Fifth Appellate District on July 2, 1965, but that was denied the same day (5 Crim. 192). He then filed a petition in the California Supreme Court on July 21, 1965, which was denied on August 18 (Crim. No. 9208).

Petitioner also sought relief in the federal courts. On May 17, 1965, he filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California,[9] but it was denied on June 7, 1965 *(Smith v. Lloyd,* No. 65-729-Y). He filed another petition on September 27, 1965, which was also denied on October 5, 1965 *(Smith v. Lloyd,* No. 65-1416-Y). In denying the application, the District Court observed that: "The petition shows that parole was rescinded because of the refusal to serve it within the State. Parole is a matter of grace and it is not the province of the person affected to dictate the condition under which it will be granted."

Underlying State Litigation

On April 17, 1968, petitioner filed a complaint for declaratory relief in the Kern County Superior Court (No. 102331), but when the matter was heard and the court discovered that petitioner really sought release

[9]At the time these cases were filed, the District Court was denominated the United States District Court for the Southern District of California, Central Division. As the result of a reorganization of the district courts in California, this same court is now the United States District Court for the Central District of California.

from custody, the declaratory-judgment action was suspended pending an application for habeas corpus relief. On October 21, 1968, petitioner filed an application for habeas corpus relief with the Kern County Superior Court (No. 884). In this petition, it was alleged that continued detention was unlawful because: (a) the Adult Authority improperly concluded that petitioner had "rejected" the conditions of parole, since petitioner had done nothing more than raise questions about the wisdom of a parole in California, and (b) petitioner had not been informed that if he refused to be paroled in California, his parole date could be rescinded. An evidentiary hearing was held and on February 25, 1969, the petition was granted and petitioner ordered discharged. The action of the Kern County Superior Court was based upon the following findings of fact and conclusions of law:

> "3. On April 25, 1961, the Adult Authority set petitioner's term on the above convictions at seven and one half (7½) years with four and one half (4½) years to be served on parole.
>
> "4. On February 26, 1962, the Adult Authority rescinded its action of April 25, 1961.
>
> "5. Said action of February 26, 1962, departed from the Adult Authority's usual custom and practice of waiting 90 days from and after parole and before referring the matter to the full board and was taken for no reason other than petitioner's expressed reluctance to spend his parole in California and in spite of the fact that petitioner had already worked out a tentative plan for residence in another state.

"6. At no time was any condition of parole regarding place of residence imposed by the Adult Authority or rejected by petitioner. The action of the Adult Authority of February 26, 1962 was arbitrary, capricious and without just cause.

CONCLUSIONS OF LAW

"(a) Petitioner's sentence, as established by the Adult Authority, may not be rescinded by said Authority without just cause.

"(b) The action of the Adult Authority in the instant case was arbitrary, capricious and without just cause.

"(c) Petitioner is entitled to be discharged."

Petitioner was discharged upon receipt of this order.

ARGUMENT

I

THE CIVIL RIGHTS ACT WAS NOT INTENDED TO RENDER STATES LIABLE IN MONETARY DAMAGES FOR THE CONDUCT OF THEIR EMPLOYEES.

Petitioner suggests that this Court grant certiorari to authoritatively resolve the question of State liability under the Civil Rights Act of 1871; an issue upon which there is no decision of this Court directly in point. "It is petitioner's contention that this unanswered question is too vital to the protection of individuals' Constitutional rights to be left to the variances of lower Court opinions." (Petition, p. 11, footnote omitted) Were there indeed any "variances of

lower Court opinions," respondent too would urge this Court to hear this case. But a grant of certiorari herein would be a needless squandering of this Court's limited resources, for the lower federal courts are unanimous in holding that a State is not liable in monetary damages for suits brought against State employees under provisions of the Civil Rights Act. *Neal v. Georgia,* 469 F.2d 446, 448 (5th Cir. 1972); *Meyer v. New Jersey,* 460 F.2d 1252, 1253 (3d Cir. 1972); *United States ex rel. Foreman v. New Jersey,* 449 F.2d 1298 (3d Cir. 1971); *Collins v. Moore,* 441 F.2d 550, 551-52 (5th Cir. 1971); *Gambocz v. Sub-Committee on Claims,* 423 F.2d 674, 675 (3d Cir. 1970); *Fear v. Pennsylvania,* 413 F.2d 88, 89 (3d Cir.), cert. denied, 396 U.S. 935 (1969); *United States ex rel. Gittlemacker v. County of Philadelphia,* 413 F.2d 84, 86 (3d Cir.), cert. denied, 396 U.S. 1046 (1969); *Whitner v. Davis,* 410 F.2d 24, 29 (9th Cir. 1969); *Stewart v. Minnick,* 409 F.2d 826 (9th Cir. 1969); *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F.2d 321, 324 (6th Cir. 1967); *Loux v. Rhay,* 375 F.2d 55, 58 (9th Cir. 1967); *Clark v. Washington,* 366 F.2d 678, 680-81 (9th Cir. 1966); *Williford v. California,* 352 F.2d 474, 476 (9th Cir. 1965); *United States ex rel. Lee v. Illinois,* 343 F.2d 120 (7th Cir. 1965).

The Court of Appeal based its decision upon the opinion of this Court in *Monroe v. Pape,* 365 U.S. 167, 187-91 (1961), wherein this Court examined the genesis of the Civil Rights Act of 1871 and concluded that Congress intended liability to extend only to

natural persons and not to municipalities. Such reliance upon *Monroe* is sound. If the Act was not intended to apply to municipalities, it would hardly be reasonable to suggest that the statute was intended to apply to the States, despite the fact that the municipalities of which State is composed are themselves immune from suit. *Williford v. California,* 352 F.2d 474, 476 (9th Cir. 1965). Thus the lower federal courts are unanimous in the view that a State is not a "person" within the purview of the Civil Rights Act. *United States ex rel. Foreman v. New Jersey,* 449 F.2d 1298 (3d Cir. 1971); *Fear v. Pennsylvania,* 413 F.2d 88, 89 (3d Cir.), cert. denied, 396 U.S. 935 (1969); *Whitner v. Davis,* 410 F.2d 24, 29 (9th Cir. 1969); *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F.2d 321, 324 (6th Cir. 1967); *Williford, supra; United States ex rel. Lee v. Illinois,* 343 F.2d 120 (7th Cir. 1965).

Citing *District of Columbia v. Carter,* 409 U.S. 418 (1973), petitioner claims that this Court has limited *Monroe* to municipalities, and has in *Carter* indicated that the Civil Rights Act was intended to apply to the States (Petition, pp. 14-15). *Carter,* however, is inapposite and does not stand for the proposition that States are liable for monetary damages; the decision actually discussing States only insofar as the Act imposes liability upon persons acting under the color of law of any "State or Territory." This Court has in fact only recently reaffirmed *Monroe v. Pape* insofar as it has pointed out that liability under the Act extended only to "persons." See *City of Kenosha v.*

Bruno, 412 U.S. 507, 512-13 (1973); *Moor v. County of Alameda,* 411 U.S. 693, 706 (1973).

II

CALIFORNIA HAS NOT AND CAN NOT CONSENT TO SUITS IN FEDERAL COURTS UNDER THE CIVIL RIGHTS ACT

Petitioner asserts that California is amenable to federal Civil Rights Suits because, under various provisions of State law, California has consented to suits for damages. There are three distinct reasons why petitioner's contention is without merit.

(1) Under the Eleventh Amendment, a State cannot be sued by its own citizens without its consent. *Hans v. Louisiana,* 134 U.S. 1, 10-21 (1890). Under the California Tort Claims Act, the State has consented to suits under limited circumstances *in state courts.* California has not consented to being sued in federal courts under provisions of the federal Civil Rights Act. See *Whitner v. Davis,* 410 F.2d 24, 29 (9th Cir. 1966); *Clark v. Washington,* 366 F.2d 678, 680 (9th Cir. 1966); see also *Gambocz v. Sub-Committee on Claims,* 423 F.2d 674, 675 (3d Cir. 1970).

(2) Even under California law, the State is immune from suits for damages arising out of "any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release." Calif.

Gov. Code § 845.8(a). Whatever California has consented to, it has not consented to suits such as petitioner's which arise out of an alleged erroneous rescission of parole.

(3) A State may consent to be sued. *Parden v. Terminal R. Co.,* 377 U.S. 184, 186 (1964). However, parties cannot by "consent" create jurisdiction in a federal court which had no jurisdiction in the first place. *Mills v. Brown,* 42 U.S. (16 Pet.) 337, 339 (1842). Thus the parties cannot "consent" to federal jurisdiction which purports to rest upon provisions of the Civil Rights Act when that Act does not extend liability under those circumstances. See *City of Kenosha v. Bruno,* 412 U.S. 507, 511-12 (1973). Since the Civil Rights Act was not intended to apply to States in the first place (see Argument I, *supra),* California cannot "consent" to being sued under any of its provisions.

III

A STATE CANNOT BE SUED FOR MONETARY DAMAGES UNDER TITLE 28, UNITED STATES CODE, SECTION 1331

Relying upon *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), petitioner asserts that the State of California can be sued for "violations" of federal constitutional rights under title 28, United States Code, section 1331; a remedy wholly independent of the Civil Rights Act (Petition, pp. 10, 20-23). But as the Court of Appeal correctly observed, *Bivens* "is wholly concerned with questions of federal

claims against individuals—not sovereign immunity." *Bivens* does not purport to abrogate the Eleventh Amendment which renders States immune from suits without their consent, even if suit is allegedly based upon federal constitutional rights, *Parden v. Terminal R. Co.*, 377 U.S. 184, 186 (1964).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, January 11, 1974.

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